United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-2105

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 75-2105

In the Matter of the Application of
DEIDRE SMITH,

Petitioner-Appellant,

-against-

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility,

Respondent-Appellee.

B
P/s

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. Is appellant entitled to federal habeas corpus relief where the claim that there was an unlawful search of her apartment, was fully adjudicated adversly to appellant in a state Court suppression hearing which found on the facts and the law that she consented to the search?

2. Is appellant entitled to federal habeas corpus relief on her claim that her statements should have been suppressed, when she was given Miranda warnings upon arrest?

3. Did the prosecutor's statement during summation, accompanied by curative instructions by the trial court deprive petitioner of a fair hearing?

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York, (Tyler, J.) dated April 4, 1975 which denied appellant-petitioner's (hereafter petitioner) application for a writ of habeas corpus. The District Court (Pierce, J.) granted a certificate of probable cause on June 25, 1975.

History of the Case*

On January 24, 1971, sometime after 1:00 A.M. Bobby Madden was shot in the hallway of the fifteenth floor of the apartment house at 1841 Central Park Avenue Yonkers, New York. Several tenants on the fifteenth floor, including the Sinhoff's called the Yonkers police Department to report the incident, [Tr. 705].

Patrolmen Weisse and Drexel responded to the radio-call and were the first police to arrive at the scene. [Tr. 335,338]

* The facts are based on findings of facts made by Judge Couzens in denying petitioner's motion to suppress. [Tr. - refers to trial transcript] [SH refers to suppression hearing].

As they left the elevator on the fifteenth floor, they could see a body in the hallway. They also saw a woman placing a box near the elevator [Tr. 336]. They proceeded to walk toward the body, when someone shouted, "Stop her, she's the wife." [Tr. 636, 390, 336, 1107] Officer Drexel stopped the appellant who left the metal box and was running toward the stairwell, located opposite the elevator [Tr. 715, 636, 391].

The appellant and Officer Drexel walked toward the body. The appellant was hysterical. She was comforted by Mrs. Sinkoff, a neighbor and invited into apartment 15-B [Tr. 337, 707, 708, 1252-53]. Mrs. Sinkoff told her to call her mother. Mrs. Sinkoff told the officer that appellant was several months pregnant. This was later verified by appellant.

Detective Parise, the first detective to arrive, noticed that several policeman were already at the scene. He quickly viewed the body, spin cartridges and metal box, which were in the hallway, before entering the Sinkoff's apartment, where he was told he might find the deceased's wife.

He apologized to the appellant, but indicated that he had to ask her a few questions about the man in the hall, and what had occurred [Tr. 473, 474], the appellant then requested that they go back to her apartment, which they did. [SH 192, Tr. 475-476]. She then told him she wanted to return to her

own apartment because she and the deceased had been living together under the name of Eversky and she did not want the neighbors to know that she wasn't legally married. [SH. 192 Tr. 1257-1258].

Other officers and detectives appeared, among them Deputy Police Chief, then Lieutenant Sardo, Detective Styplukowski and Sergeant DiAmbrosio.

Upon his arrival, Detective Stypulkowski was informed by a neighbor, that Bobby Madden had opened the door of apartment 15-A with his key and was stepping into the apartment when he was pushed back and shot and followed down the hall by a man who fired five shots at him before Madded collapsed in the vicinity of apartment 15-B [SH. 150 Tr. 364-8] Later the appellant was seen removing property from the deceased's pockets. She was also seen returning to the apartment, and then exiting with the metal box, at which time she had been observed by Drexel and Weisse [Tr. 1246-50]

Detective Stypulkowski was further informed that appellant was now in apartment 15-A with Detective Parisi. [Tr. 480, 482,483] Detective Stypulkowski entered the apartment where he found the appellant and Detective Parisi. Appellant asked to go to the bathroom which she was allowed to do. [Tr. 83, 258, 482] While she was in the bathroom, Chief Sardo was briefed on the investigation.

When she returned, Chief Sardo asked if they could look around for a gun, since it was possible that during the confusion, someone might have put one in the apartment. She said to go right ahead [SH 13, Tr. 258]. The Chief and the appellant went into the bathroom. He again asked if he could look around. She again said yes. [Tr. 258, 259, 484, 485-88] He discovered a hat box top with what appeared to be a maujuana cigarette in it. [Tr. 88, 259, 485, 486]

They returned to the living room where appellant requested and was allowed to make a telephone call to Thelma Grant. [Tr. 259] After the call she asked to go to the bathroom again. She was told not to lock the door. [Tr. 88, 89, 260] She left it slightly ajar. The toilet began flushing and the shower was heard running. After a period of time, one of the officers knocked on the door and she was told to come out. [Tr. 261, 89, 487]

She stated she had taken a shower and needed a robe [Tr. 489, 89] Detective Stypulkowski went into the bedroom and returned with a fur coat he found on the bed. Appellant then went into the bedroom to dress. While she was dressing, Chief Sardo went into the bathroom and saw a large paper bag with a white powdery residue on it. There was also a white powdery residue on the toilet sink and tub. [SH. 16] Detective Parisi

who had been a narcotics detective for a number of years expressed the opinion that it was heroin. While this discussion took place in the bathroom, Detective Stypulkowski knocked on the bedroom door, feeling that appellant had ample time in which to dress. When the door opened, he felt a cold blast of air and noticed one of two windows directly opposite the door was open. He walked to the window and found a bag on the sill which contained a white powder in a cellophane bag. [Tr. 269] Detective Parisi was called and said "it looked like junk."

Sergeant D'Ambrosio was sent to the area below the window to check for evidence.

A quanty of narcotics was found in the parking lot directly below apartment 15-A's window. Detective Stypulkowski returned with the narcotics that were found. Upon his return, he checked the bathroom. He saw the one-piece jump suit in an open hamper, removed it and noted traces of white powder on it, which was later found to be cocaine [Tr. 91].

While Stypulkowski was in the bathroom, Chief Sardo placed appellant under arrest for possession of narcotics and advised her of her rights. Detective Stypulkowski entered the living room and began glancing around the apartment. Appellant asked him if he wanted to search the apartment and he said yes, she said "Be my guest, but don't tear it up." [SH 114, SH 221, 486]

A search was begun and turned up a scale, several thousand glassine envelopes and additional narcotics from a den area [SH 195]. While this proceeded, appellant returned to the bedroom to redress, in the company of Chief Sario and Thelma Grant, who had arrived. In the bedroom, Sardo found a small paper bag with glassine envelopes of narcotics on windowsill and several more in a kleenex box. Upon their return, the metal box from the hall was brought into the living room, and when opened, was found to contain additional narcotics.

As she was about to leave the apartment to go to the police station, she asked "can I go to the bathroom, I really have to go this time."

Petitioner was held as a material witness on February 1, 1971. Bail was set at $100,000.00. Petitioner was indicted on March 16, 1971 on two counts, charging criminal possession of a dangerous drug, in the first degree for possession of heroin and cocaine in the Westchester County Court.

Petitioner moved to suppress the tangible evidence seized by the police on January 24, 1971, as well as statments taken by them. A suppression hearing was held before Judge Couzens, and denied on December 29, 1972. The Court made its finding of facts and ruled:

"The defendant invited Detective Parisi into her apartment so that she might freely discuss the information he requested for his homicide investigation. Chief Sardo requested to look about the apartment in furtherance of that homicide investigation; at the time of these requests the defendant was not suspected of drug possession. The police were there investigating a murder and she was being cooperative in that investigation. Her consent was freely and voluntarily given. The original entry into the apartment was by invitation of the defendant, thereafter, an examination of the apartment was begun with he consent." [Appendix 104]

The court further held that statements were not made while she was in any sense of the word in custody. [Appendix I]

Petitioner then proceeded to trial, she took the stand on her behalf, she was convicted on the two counts of possession. (Couzens, J.) She was sentenced to a term of 15 years to life on February 26, 1973. On February 11, 1974 the judgment of conviction was affirmed without opinion by the New York Appellate Division, Second Department, 43 A D 2d 1018 leave to appeal to the Court of Appeals was denied on March 6, 1974.

Opinion of the Court Below

In denying a writ of habeas corpus based on claims arising from the search of the apartment, alleged statements by petitioner, and remarks made by the prosecutor, Judge Tyler noted that "Petitioner's Fourth, Fifth and Sixth Amendment contentions were dealt with by the trial judge Judge Couzens, in a suppression hearing, December 18-22, 1972. The transcript of

that hearing discloses - ample evidence to support the trial judge's conclusion that petitioner had consented to the search." [A-114]

Judge Tyler noted that petitioner's contentions of coercion were contradicted by overwhelming evidence that the neighbors not learn of her unmarried state, the reason she voluntarily invited the policemen into the apartment. [TT 1255, 1257-8, 1363-4] Judge Tyler held that the trial testimony of Patrolman Drexel who had not testified at the suppression hearing, and might support petitioner's claim was in part contradictory, in part inconclusive and in part contradicted by other policeman. As such it need not give sufficient doubt for the trial court to reconsider its ruling.

Thus, Judge Tyler stated that the determination of the trial court as to the factual issues is entitled to a presumption of correctness. LaVallee v. Delle Rose, 410 U.S. 690, 692. Under those facts the court found that there was consent to the search. Further search was justified by petitioner's consent and a threat that the drugs would be destroyed.

Judge Tyler also held that petitioner was not in custody until there was probable cause to suspect her of possession of drugs, at which time she was given Miranda warnings.

[TT 119] He held that the prosecutor's reference to a lie detector test in his summation merely clarified an ambiguity introduced by defense counsel. The court below held that the remarks in the summation were a reaction to defense counsel's remarks, and although possibly improper did not deprive petitioner of a fair trial.

POINT I

THE COURT BELOW DID NOT ERR IN HOLDING THAT THE EVIDENCE FOUND IN PETITIONER'S APARTMENT WAS PROPERLY ADMITTED INTO EVIDENCE AGAINST HER.

Petitioner's claims that evidence should have been suppressed are based on the argument that she did not consent to a search. However, the state court, after a suppression hearing, settled the factual questions and held she did consent to the search.

As the court below properly held, the state court's decision met the requirements of 28 U.S.C. § 2254 by resolving the merits of the factual dispute. Therefore, the decision is entitled to a presumption of correctness. LaVallee v. Delle Rose, 410 U.S. 690.

The Court below examined the trial transcript and the suppression hearing, and found ample evidence in the record to support the conclusion that petitioner had consented to the search.

Petitioner claims that Drexel's trial testimony rebuts the presumption of correctness. However, as has been stated before, Drexel contradicted himself by saying petitioner went into the apartment on her own [Tr. 364], and then stating she entered at someone's order. He never heard anyone order petitioner into the apartment. There was further evidence at the trial that petitioner had invited the policemen into her apartment [SH 192, TT 475-6]. Drexel could not testify about consent, because he had no conversation with the petitioner in her apartment. [TT 363 (A-74)] Such inconclusive testimony need not have given the trial judge sufficient doubt to require reconsideration of the earlier ruling. Contrast Rouse v. United States, 359 F. 2d 1014 (D.C. Cir. 1966).

Once the factual issue of consent is established, petitioner's claims as to illegal search and seizure, and "fruit of the poisonous tree" are irrelevant. In Scheckloth v. Bustamonte, 412 U.S. 218 (1973, the Supreme Court, summarized the requirements of search without warrants:

> "It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'pre se unreasonable ... subject only to a few specifically established and well-delineated exceptions.' Katz v.

United States, 389 U.S. 347, 357; Collidge v. New Hampshire, 403 U.S. 443, 454-455; Chambers v. Maroney, 399 U.S. 42, 51. It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. Davis v. United States, 328 U.S. 582, 593-594; Zap v. United States, 328 U.S. 624, 630. The constitutional question in the present case concerns the definition of 'consent' in this Fourth and Fourteenth Amendment context. supra, at 219." [Emphasis added]

The Supreme Court went on to state that it is also settled that the State has the burden of proof to show that the consent was freely and voluntarily given, supra at 222.

The Supreme Court rejected such mechanical criteria as the requirement that the subject of the search knew he had a right to refuse the search. Rather, it was the totalily of the circumstances, that determined the voluntariness of the search, supra at 229.

"When the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. supra at 248, 249.

Schneckloth did not change the rules concerning consent. Rather, the court elucidated its past opions.

The Schneckloth criteria can be applied to this case. Under the totality of the circumstances it is clear that there was a voluntary consent to that search. Petitioner herself testified that she had been hysterical, and the policemen picked her up and took her to the Sinkoff's apartment [Tr. 1359]. She asked if it would be all right to go to her own apartment to talk since she did not want the neighbors to know she was not married. [SH 192, 1258] Petitioner was an object of sympathy, rather than a suspect. [SH 202, SH 133] She was allowed to call a friend, go to the bathroom, and dress without police supervision. Knowing her lover was murdered, it was reasonable for her to agree to a search for the murder weapon on the chance that the murderer had escaped to her apartment in the confusion. [SH 13, 49, 134, 135, Tr. 258]. Even when the police officers began to be suspicious, she still gave consent [SH 114, SH 221, 486].

POINT II

ASSUMING ARGUENDO THAT THERE WAS NO CONSENT TO SEARCHING THE APARTMENT, THE COURT BELOW DID NOT ERR IN HOLDING THE DRUGS FOUND WERE THE PRODUCT OF A LAWFUL SEARCH.

Petitioner claims that once she was arrested, the policemen should have obtained a warrant for the den area. However, there was ample evidence that petitioner was attempting to destroy evidence, flushing it down the toilet, and throwing it

it out the bedroom window. Under these circumstances there was an obvious threat that more evidence could be destroyed, requiring a immediate search of the entire apartment. Schmerber v. California, 384 U.S. 757, 770 (1966). It was clear that there were drugs, and that evidence had already been destroyed. The police could reasonably infer if they did not search immediately someone else might destroy the evidence. This justified a search under "the inherent necessities of the situation at the time of arrest". Chimel v. California, 395 U.S. 752, 759 citing Trupiano v. United States, 334 U.S. 699, 708. See United States v. Pino, 431 F. 2d 1043, 1145 (2d Cir. 1970) (search proper after arrest when defendant observed mixing powders through window and overheard to say he was measuring powders for monetary gain). United States v. Rubin, 474 F. 2d 262, 270 (3rd Cir. 1973).

POINT III

THE COURT BELOW DID NOT ERR IN HOLDING THAT PETITIONER'S STATEMENTS WERE VOLUNTARY AND ADMISSABLE.

Petitioner claims that she was deprived of her constitutional rights when she answered police questions without appropriate warnings. However the trial court found that she was not in custody during the first portion of police questioning. At that time, the police were investigating a homicide committed by a man. [SH 150] They were interested in finding out possible facts surrounding that homicide. The petitioner was not in custody or the target of the investigation at that time.

(Contrast Miranda v. Arizona, 384 U.S. 436, 477 (1966).

Only when the policemen found drugs was petitioner considered a suspect. At that time she was arrested and given the warnings outlined in Miranda. [SH 19] Applying these facts to the constitutional principles, the Court below properly upheld the trial court's ruling that the petitioner's statements were voluntary and admissable. See U.S. ex rel. Irving v. Henderson, 371 F. Supp. 1266 (S.D.N.Y. 1974). U.S. ex rel. Sanney v. Montanye, 364 F. Supp. 905 (W.D.N.Y.) affd. 500 F. 2d 411 (1974).

POINT IV

THE COURT BELOW DID NOT ERR IN HOLDING THAT THE PROSECUTOR'S STATEMENT DURING SUMMATION DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL.

The proper standard to be applied in considering whether prosecutorial summations in state trials violated due process requirements was set forth in Buchalter v. U.S., 319 U.S. 427, 431 (1943):

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land' ... But the amendment does not draw to itself the provisions of state constitutions or state laws . . ." Buchalter v. New York, 319 U.S. 427, 429-30 (1942).

". . .The speeches of counsel for defendants apparently provoked statements by the District Attorney of which petitioner now complains. This does not raise a due process question.

"As we have recently said, 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable relity (quoting Adams v. McCann, 317 U.S. 269, 281). Buchalter v. New York, 319 U.S. 427 (1942)."

That standard was reaffirmed in Donnelly v. DeChristoforo, 416 U.S. 637, 1974. In that decision, the court held that remarks in a prosecutor's summation did not deprive the defendant of a fair trial supra at .

In this case, the prosecutor's remarks came during summation, in response to defense counsel's questions relating to a lie detector test during direct examination. The test concerned the murder investigation only. However, Defense counsel's also implied during summation that the lie detector test dealt with the drug matter and petitioner had been misled into taking the test. This could have led to the jury's speculation of police coercion. [567-8] As the court below noted, at this point the only way prosecutor could reput the statements about the lie detector statements was to say

"Deidre was not asked any questions to my knowledge, I wasn't there, but I talked to him the man the state trooper who did it, and he said he did not ask any questions about drugs and that is all I will say under these circumstances, Your Honor on that. [Tr. 1588]".

The Court charged the jury to disregard statements made by counsel. [TT 1666].

Under these circumstances, the prosecutor's statement did not deprive petitioner of a fair trial. Donnelly v. DeChristoforo, 416 U.S. 637 (1974) U.S. ex rel. Castillo v. Fay, 350 F. 2d 400 (2d Cir. 1965); see also United States v. Tramunti, 513, F. 2d 1087, 1119 (2d Cir. 1975).

POINT V

THERE HAS BEEN NO PREJUDICE SHOWN TO PETITIONER BY EITHER THE STATE OR FEDERAL COURT.

Petitioner claims that Judge Corezens was prejudiced against her because "he was personally acquainted with the police officers."

She also claims Judge Tyler was prejudiced in deciding her case, because he was nominated to be a Deputy Attorney General of the United States, "a position that entails supervision of joint Federal-State prosecutions for offenses involving possession of narcotics."

However, petitioner does not show in either case how she was prejudiced, or what possible motivation either judge might have in ruling against her. Contrast Tumey v. Ohio, 273 U.S. 510 (1926) (mayor who tried the case received money for every guilty verdict).

Mere allegations are insufficient. Indeed, under Federal Law, 28 U.S.C.A. § 144 an affidavit of prejudice against a judge must show that "objectional inclination or disposition of the judge; it must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." Rosen v. Sugarman, 357 F. 2d 794, 798, (2d Cir. 1966) citing Berger v. United States, 255 U.S. 22 (1921). Certainly, mere acquaintance with the witnesses or a new appointment do not rise the level of consideration for disqualification. Weiss v. Hunna, 312 F. 2d 711 cert. den. 374 U.S. 853, reh. den. 375 U.S. 874.*

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
November 18, 1975

Respectfully submitted,

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* Petitioner raised any of these issues previously, either through coram nobis in the state court or through an affidavit of prejudice in the Federal Court. Therefore, there is a question of exhaustion of state remedies Picard v. Connor, 404 U.S. 270.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROSALIN SMALLS , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent herein. On the 18th day of November , 1975 , s he served the annexed upon the following named person :

FREDERICK J. LUDWIG, ESQ.
Suite 4419
60 East 42nd Street
New York, N.Y. 10017

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Rosalin Smalls
ROSALIN SMALLS

Sworn to before me this
18th day of November , 1975

Barbara Shore Rosnick
Assistant Attorney General
of the State of New York